

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

September 4, 2007

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

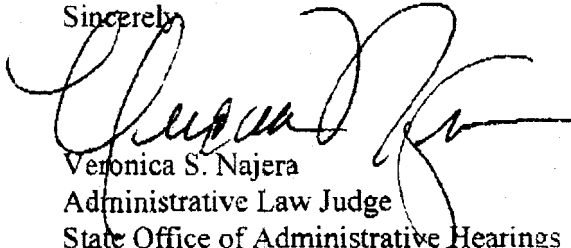
VIA FACSIMILE NO. 512-206-3350
AND REGULAR MAIL

RE: Docket No. 458-06-2812
Texas Alcoholic Beverage Commission v. Martina Barba d/b/a Rafa's Bar

Dear Ms. Fox:

Please find enclosed the Amended Proposal for Decision on the above referenced case.

Sincerely,



Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
El Paso Regional Office

VSN:cr
Enclosure

cc: Docket Clerk, State Office of Administrative Hearings- VIA Docket Change Form

Sandra K. Patton, Attorney, TABC Legal Division- VIA Facsimile No. 713-426-7965

Sergio Gonzalez, Attorney at Law, 851 Lockheed Drive, El Paso, Texas 79925 - VIA Facsimile No. 915-779-3630

DOCKET NO. 458-06-2812

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,**

Petitioner

V.

MARTINA BARBA
d/b/a RAFA'S BAR
PERMIT NO. BG-512382

Respondent

EL PASO COUNTY, TEXAS
(TABC CASE NO. 612870)

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

AMENDED PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Petitioner) brought this disciplinary action against Martina Barba d/b/a Rafa's Bar (Respondent), alleging that Respondent issued four checks or drafts which were dishonored when presented for payment.

After a second contested case hearing and review of the applicable law, hereto, the Administrative Law Judge recommends that Respondent's permit be suspended for a period of 16 days, or in lieu of the suspension, Respondent shall pay a \$2,400.00 civil penalty.

I. NOTICE AND JURISDICTION

A Notice of Hearing was issued on July 12, 2006. A First Amended Notice of Hearing was issued on March 12, 2007, by the Texas Alcoholic Beverage Commission, apprising all parties of Petitioner's allegations and of the hearing date. Notice and jurisdiction were not contested issues and are addressed in the findings of fact and conclusions of law without further discussion here.

II. PROCEDURAL HISTORY

The contested case hearing was first heard on August 8, 2006, at which time, Judith L. Kennison appeared for the TABC, and the Respondent and/or his attorney, failed to appear. Thereafter, a Default Proposal for Decision was issued.

Pursuant to an Order Granting Rehearing from the TABC, a second contested case hearing was convened before ALJ Veronica S. Najera, on July 11, 2007. All parties appeared at the SOAH El Paso Regional Office, located at the State Office Building, 401 East Franklin Avenue, Suite 580, El Paso, Texas. The TABC was represented at the hearing by Sandra K. Patton, a TABC Staff Attorney. The Respondent was represented by Sergio Gonzalez, attorney at law. The record closed on July 18, 2007, after the receipt of additional exhibits proffered by Petitioner. The procedural history which led to the second hearing is as follows:

July , 2006	Notice of Hearing issued
July 17, 2006	Petitioner's Motion to Appear by Telephone
July 19, 2006	Order Granting Petitioner's Motion to Appear by Telephone
August 4, 2006	Entry of Appearance filed by Respondent's attorney Sergio Gonzalez
August 4, 2006	Respondent's First Motion for Continuance
August 7, 2006	Order Granting Respondent's Motion for Continuance
August 28, 2006	Hearing-Judith Kennison for TABC via telephone/Respondent did not appear
October 17, 2006	Proposal for Decision-Default
October 27, 2007	Motion for Exceptions to Judge's Reconsideration
January 2, 2007	Motion for Reconsideration
February 7, 2007	TABC's Order Granting Rehearing
February 9, 2007	Order Setting Case for Hearing
February 13, 2007	Petitioner's First Motion for Continuance

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March 7, 2007	Order Granting Petitioner's First Motion for Continuance
March 12, 2007	First Amended Notice of Hearing
May 11, 2007	Petitioner's Second Motion for Continuance
May 14, 2007	Order Granting Petitioner's Second Motion for Continuance

III. DISCUSSION

A. Background

Respondent operates a bar establishment within the City and County of El Paso, Texas.¹ Respondent holds a Wine and Beer Retailer's Permit.² The permit was originally issued on April 4, 2002. The TABC alleges that Respondent executed four checks or drafts for the purchase of beer which were dishonored when presented for payment.

B. Evidence

Petitioner proffered seven exhibits: custodian of record affidavit, copy of license and violation history (Exhibit No. 1); Affidavits and copies of insufficient checks (Exhibit No. 2); Notice of Hearing (Exhibit No. 3); First Amended Notice of Hearing (Exhibit No. 4); Notice of Hearing on a surety bond case No. 458-04-7274 involving same Respondent (Exhibit No. 5); Motion and Order to Dismiss on case No. 458-04-7274 (Exhibit No. 6); ABC dismissal order on case No. 458-04-7274 (Exhibit No. 7). All documents were admitted into evidence. Respondent did not proffer any evidence.

Rafa's Bar is located at 914 S. Stanton Street, El Paso, Texas 79901, El Paso, El Paso County, Texas.

See Petitioner's Exhibit No. 1, Wine and Beer Retailer's Permit BG-512382.

³ See Petitioner's Exhibit No. 2, which contains documentation that shows that Respondent issued four insufficient checks for the payment of beer. The asserted checks are dated: December 11, 2003, in the amount of \$195.10; February 18, 2004, in the amount of \$204.20; April 30, 2004, in the amount of \$517.10; and on May 28, 2004, in the amount of \$483.10.

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IV ANALYSIS

The fact that Respondent issued four dishonored checks is not disputed. Respondent did not offer any legal argument to rebut the allegations. Respondent did advocate that a dismissal order issued in 2004 involving the Respondent was a dismissal of the alleged violations. The exhibits show that the dismissal order was in reference to a bond forfeiture case involving Respondent and has nothing to do with the cash law case at hand.⁴

The TABC seeks a 16-day suspension, or in lieu of the suspension, a civil penalty of \$2,400.00 for the issuance of four dishonored checks. The ALJ agrees that TABC's penalty recommendation is appropriate. Section 61.73(b) of the Texas Alcoholic Beverage Code authorizes the Commission or Administrator to cancel or deny a permit for the retail sale of alcoholic beverage if it is found that the licensee gave a check as full or partial payment which is dishonored when presented for payment. Based upon the above-listed Code provision, a 16-day suspension, or a \$2,400.00 civil penalty is recommended.

FINDINGS OF FACT

Martina Barba d/b/a Rafa's Bar holds a Wine and Beer Retailer's On Premise Permit, issued by TABC under number BG-512382, for the premises located at 914 S. Stanton Street, El Paso, Texas 79901.

On July 11, 2006, the TABC issued a Notice of Hearing to Respondent at its mailing address of record reflected on Respondent's permits: 914 S. Stanton Street, El Paso, Texas 79901. This notice was sent by U.S. Post Office certified mail, return receipt requested. The "green card" No. 7001 2510 0000 7275 0395 was returned to TABC with a signature indicating receipt.

The Notice of Hearing contained a statement of the time, place and nature of the hearing; a

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hibit

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statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a statement of the matters asserted.

The Notice of Hearing properly disclosed in at least twelve-point, bold-face type that upon Respondent's failure to appear at the hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought may be granted by default.

- 5 On August 28, 2006, a hearing was convened before ALJ Veronica S. Najera, at the State Office of Administrative Hearings, El Paso Regional Office, located in the State Office Building, 401 East Franklin Avenue, Suite 580, El Paso, Texas. TABC was represented at the hearing by Judith L. Kennison, a TABC Staff Attorney. Respondent did not appear and was not represented at the hearing.
6. A proposal for decision was issued on October 7, 2006
ABC granted a rehearing on this cause on February 7, 2007.
8. The case was scheduled for rehearing on July 2007.
9. An Amended Notice of Hearing was issued on March 12, 2007
10. On July 11, 2007, a contested case rehearing was convened in this matter at the State Office of Administrative Hearings in El Paso, Texas.
The record closed on July 18, 2007.
12. On December 11, 2003, Respondent issued a check or draft in the amount of \$195.10 for the purchase of beer that was dishonored when presented for payment.
On February 18, 2004, Respondent issued a check or draft in the amount of \$204.20 for the purchase of beer that was dishonored when presented for payment.
- 14 On April 30, 2004, Respondent issued a check or draft in the amount of \$5 10 for the purchase of beer that was dishonored when presented for payment.
- 15 On May 28, 2004, Respondent issued a check or draft in the amount of \$483.10 for the purchase of beer that was dishonored when presented for payment.

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VI. CONCLUSIONS OF LAW

The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.31 and 5.35.

The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2001 and TEX. ALCO. BEV. CODE ANN. § 5.43.

Based upon Findings of Fact Nos. 2-4 and 9, TABC issued its Notice of Hearing in compliance with 1 TEX. ADMIN. CODE §§ 155.27 and 155.55 and TEX. ALCO. BEV. CODE ANN. § 11.63.

4. Based upon Finding of Fact Nos. 12-15, Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 61.73 and 102.31.
5. Based upon Findings of Fact Nos. 1-6, Conclusion of Law No. 5, and TEX. ALCO. BEV. CODE ANN. § 61.73, Respondent's permits should be suspended for a period of 16 days, or in lieu of the suspension, Respondent shall pay a \$2,400.00 civil penalty.

SIGNED September 4, 2007.



VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS